inception, intended to attack the specific party suing. The gist of civil recovery is damage, the conspiracy usually being important only to give additional rights against persons who, though inactive, nevertheless participated in the common design. *Hutchins* v. *Hutchins*, 7 Hill (N. Y.) 104; *Robertson* v. *Parks*, 76 Md. 118. So the plaintiff may fail to prove the conspiracy, yet recover against any defendants who actually caused the injury. *Doremus* v. *Hennessy*, 62 Ill. App. 391. On this principle the present plaintiff should have recovered at least from those who discriminated. But under the New York statute, this combination is a criminal conspiracy. N. Y. PENAL CODE, § 168, subd. 6; *People* v. *Sheldon*, 139 N. Y. 251. When an injury has been caused by the carrying out of criminal designs, it should be no excuse that the acts originated from another purpose. The principal case, therefore, seems wrong in giving heed to the specific intent where an illegal combination was the proximate cause of the injury.

WITNESSES — COMPETENCY — COMPETENCY OF WITNESS CONVICTED IN ANOTHER STATE TO TESTIFY. — A Missouri statute declared that persons convicted of certain specified crimes should be incompetent to be sworn as witnesses. In a criminal suit a witness convicted of such a crime in Indiana testified under objection. *Held*, that his testimony was properly admitted in Missouri. *State* v. *Landrum*, 106 S. W. 1111 (Mo., K. C. Ct. App.).

The civil law regarded infamy as a status governed by the law of the convict's domicile. 2 BOULLENOIS, obs. 32. This view, with its incident of incapacity to testify elsewhere, was not adopted by the common law. STORY, CONF. OF L., 8 ed., §§ 91, 92. Nor does the constitutional requirement that judgments of the several states be given full faith and credit give rise to an extraterritorial incapacity; it refers only to the conclusiveness of the fact for which a judgment stands. *Com.* v. *Green*, 17 Mass. 515. The question then is, does the local law of a state render one convicted in another state incompetent to testify? It has been held that it does, provided the other state's law corresponds with that of the former. *Chase* v. *Blodgett*, 10 N. H. 22. But the better of the scanty authority, either at common law or under statutes substantially declaratory, gives no effect at home to foreign convictions, whatever their effect there. *Sims* v. *Sims*, 75 N. Y. 466; *contra*, *State* v. *Candler*, 3 Hawks (N. C.) 393. This result is justified in view of the varying attitudes of different states toward the same crimes, and the possible untrustworthiness of one convicted of crime abroad is sufficiently guarded against by admitting the fact of conviction on the question of his credibility.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

GOVERNMENTAL POWERS OF THE PRESIDENT OVER NEWLY ACQUIRED TERRITORY. — By the treaty of Feb. 26, 1904, with the Republic of Panama the United States acquired in perpetuity the use of a strip of land ten miles wide, running across the isthmus, which is commonly known as the Canal Zone. The Fifty-eighth Congress, then in session, voted by a resolution of April 28, 1904, that until the expiration of that session, or unless provision for a temporary government should be sooner made, all powers of government should be vested in the President, or in such persons as he should appoint. The Sixtieth Congress is now in session. On March 19th Representative Harrison of New York said that since the expiration of the Fifty-eighth Congress no further provision had been made for the government of the Canal Zone; that since that time the President had had authority to act only as the executive of a *de facto* govern-

ment, but that he had been acting in a legislative capacity, making among other laws those establishing trial by jury, regulating marriage, and defining crimes.[1] While not criticizing adversely any specific law, Mr. Harrison declared that such legislative action by the President was unconstitutional; that in the acquisition of all other territory former Presidents had acted in a legislative capacity only by virtue of their being at the head of a temporary military government; that in the Canal Zone there was no military government and no necessity for one. Accordingly Mr. Harrison presented a resolution, which was adopted, asking the President to show by what authority he had acted.

The power of the United States to acquire new territory, and to govern such territory otherwise than as a state, is undisputed.[2] It has been a fundamental theory of English law that the temporary power of government of newly acquired territory is in the executive until this power is assumed by Parliament or relinquished to the inhabitants of the territory.[3] Such seems to be the law in this country, subject to constitutional limitations which are binding on Congress as well as on the President; for there must be some government over such territory, and until Congress assumes control this implied power must necessarily rest in the executive as such. Thus, though the governments instituted under executive authority by General Kearney in New Mexico, and Admiral Stockton in California, were called military governments by Mr. Harrison, they were not so in fact.[4] For example, in California, on the conclusion of the treaty with Mexico, the President abolished the military duties and established the usual customs duties, and the validity of such legislation up to the time that Congress took charge of the customs was upheld by the Supreme Court.[5] It seems fair, therefore, to conclude in the present case that if Congress had not, by the Act of April 28, 1904, given the President power to govern the Canal Zone for a year, he would have been justified in his exercise of governmental functions.

The question remains as to the effect of that Act. It has been contended that the Act was merely declaratory of the already existing powers of the President; that this is an example of the abundant caution of Congress, which often confirms acts which need no confirmation, and declares to exist rights already existing. Under such construction this Act would be simply nugatory. A second view is that the Act merely authorized the President to delegate his powers to a commission so that at the end of the Fifty-eighth Congress he could no longer make any such delegation, but retained all governmental power in himself. In this light, too, the Act would have no effect upon the President's power to govern without a commission. A third construction already suggested is that Congress assumed the power and delegated it to the President for a specific period only. If thereby Congress is considered to have assumed control of territory for a year, after that year and until Congress resumes control, the President can exercise the governmental power, for the same reasons of policy as in the former case where Congress has not yet taken control of newly acquired territory. But if this construction should be said to mean that Congress permanently took control and decided for a year to exercise its control through the President, and after that time made no provision by which he could act for it and did not act itself, then a new question is raised. Simply for the supremacy of the United States it might not be as necessary in this case as in the case of newly conquered territory that the President have control while Congress is not in fact acting; for an interval between legislative acts, unlike an interval before the legislature has acted, must always be of a kind which the legislature could foresee and provide for. But the United States owes at least a moral duty both to its own citizens and to the citizens of foreign nations who are in the Canal Zone, to see that they are protected in their personal rights according

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[1] Executive Order, Mar. 13, 1907; May 31, 1907; Feb. 6, 1908.
[2] American Ins. Co. *v.* Canter, 1 Pet. (U. S.) 511.
[3] Campbell *v.* Hall, Cowp. 204.
[4] See Leitendorfer *v.* Webb, 20 How. (U. S.) 176.
[5] Cross *v.* Harrison, 16 How. (U. S.) 164.

to some principles of justice. For their protection a permanent control by Congress with a cessation of all actual regulation is a mere form without substance, so that from the point of view of the governed expediency requires that the President have governmental power in the interval between congressional regulations.

VOID, ILLEGAL, OR UNENFORCEABLE CONSIDERATION. — In a recent article Mr. William P. Rogers discusses the various phases of contracts in which a part of the consideration furnished by one party is void and part valid. *Void, Illegal, or Unenforceable Consideration*, 17 Yale L. J. 338 (March, 1908). The writer logically begins his discussion with Pigot's Case,[1] where it was said that if some of the covenants of an indenture are unlawful and others lawful, the latter will stand good. This appears to be the earliest case on the subject and has led to considerable conflict of authority.

If we suppose that A agrees to pay B $100 in return for B's promise to do a lawful as well as a criminal act, it is conceded that the latter promise will vitiate the entire contract, no matter which of the promises has been performed.[2] If we suppose that B has promised to do a lawful act and one that is unlawful but not criminal or *malum in se*, the result may be different. It is true that B's unlawful promise being absolutely void can form no consideration for A's executory promise, and that the latter, being by hypothesis indivisible, falls to the ground through failure of consideration; and since A is under no obligation it is impossible to enforce B's promise.[3] But if A has fully performed his part of the agreement, it is generally held that, though B's unlawful promise is still void, A may enforce the lawful promise of B, since there is now ample consideration for such promise and A's promise, being executed, needs no consideration. B on the other hand, whether he performs or not, will never be able to enforce A's promise, supposing it to be executory, since neither his promise nor its performance, which is against public policy, can support A's promise.[4] A similar distinction between executory and executed contracts is sometimes made when B, who is already under a contract duty to C, makes a subsequent promise to A to perform such contract, in return for A's promise to pay. It may well be that such executory contract is of no effect because B has furnished no consideration for A's promise,[5] but if A actually pays B for the subsequent promise he may hold B, though, of course, B, whether he performed or not, would never be able to compel A to perform.[6]

Passing now to contracts in which part of the consideration is unenforceable merely because of some defense, such as the statute of frauds, the learned writer reaches the conclusion that A should be allowed to hold B upon his lawful and enforceable promise, even though his own promise remains executory. A promise unenforceable because of the statute of frauds is generally considered as merely subject to a defense and in no sense illegal, and such a promise is sufficient to make A's promise binding.[7] Since the contract is therefore valid, Mr. Rogers is undoubtedly correct in his conclusion that A may recover for a breach of the promise which is not subject to the defense of the statute of frauds without himself performing, provided, of course, such non-performance does not itself constitute a breach. It must also follow that B should be allowed the same right against A, for we have seen that B's promise can only be enforced when A is also bound. In accord with this view it has been held that when one party to a contract is protected by the statute of frauds he may nevertheless sue the other party for breach of his valid promise.[8]

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[1] 11 Reports 27 *a*.
[2] See United States *v.* Bradley, 10 Pet. (U. S.) 343.
[3] Kearny *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700.
[4] Widoe *v.* Webb, 20 Oh. St. 431.
[5] See Wald's Pollock, Contracts, Williston's ed., 207.
[6] *Ibid.* 208.
[7] 12 HARV. L. REV. 424.
[8] Justice *v.* Lang, 42 N. Y. 493.